# SECTION 14

## Digests

## Section 14(c)

The Eleventh Circuit holds that since employer never notified the deputy commissioner that it had begun payment of compensation, as is required by Section 14(c), it would be inequitable to allow employer to credit the wages it paid claimant during the period for which claimant is entitled to total disability benefits against its liability for the total disability benefits. Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), aff'g and rev'g Patterson v. Savannah Machine & Shipyard, 15 BRBS 38 (1982) (Ramsey, C.J., concurring and dissenting).

The First Circuit states that the provisions at Section 14(c), (g) requiring employer to file forms with the district director at the time compensation is first paid and on the suspension or termination of compensation are intended to permit the Department of Labor to keep track of payments and to take remedial action on its own initiative; these provisions do not confer rights on claimant and cannot be enforced by claimant. *Neely v. Benefits Review Board,* 139 F.3d 276, 32 BRBS 73 (CRT)(1st Cir. 1998).

## Section 14(d)

Since employer filed its notice of controversion within 2 weeks of its having knowledge of claimant's injury, the Board holds employer's filing of its Notice of Controversion is timely. Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26 (1988).

The Board holds as a matter of law that a document which does not provide the grounds upon which the right to compensation was controverted could not constitute a "controversion" under Section 14(d), even though the title of the document is not determinative. In this case, employer's "answer" is not a controversion because it states that employer does not controvert the claim unless new evidence establishes that the claim is not compensable. Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990); Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989) (en banc) (Brown, J., concurring), aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990).

The Fifth Circuit affirmed the Board's holding that employer's letter accepting liability subject to the admission of contrary evidence did not constitute a controversion pursuant to Section 14(d). Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), aff'g in pert. part and rev'g on other grounds Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989) (en banc) (Brown J., concurring), and Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989) (en banc) (Brown J., concurring).

A notice of suspension filed within 14 days of the cessation of payments by an employer to claimant, which provides the information required by Section 14(d) of the Act, is the functional equivalent of a notice of controversion and precludes application of an assessment pursuant to Section 14(e). Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989).

The filing of a timely answer in a state compensation claim does not excuse the employer's duty to file a controversion under the Act within 14 days of awareness of the injury. *Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989).

The Board holds that employer's Notice of Voluntary Payment of Compensation forms, LS-206, filed for two injuries are not the functional equivalent of timely filed notices of controversion sufficient to relieve employer of liability under Section 14(e). Employer listed only the rates on which voluntary payments of compensation were made for each injury. These forms do not state that the right to compensation is being controverted or provides grounds therefor. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

The Board held that employer's LS-202 Form, First Report of Injury, is inadequate to meet the requirements of a notice of controversion under Section 14(d). The form merely states in seven places "no injury admitted" and is not responsive to the questions posed by the form. The form does not state that the right to compensation is being controverted or provide specific reasons for such an action as is required by Section 14(d). Moreover, the purpose of Form LS-202 involves the requirements of Section 30 of the Act, and the form states on the reverse side that "If the employer controverts the right to compensation he must also file a notice of controversion with the deputy commissioner. . . ." The Board thus reversed the administrative law judge's finding that employer timely controverted the claim and held that claimant is entitled to a Section 14(e) penalty from the date of the notice of injury to the date employer filed an actual notice of controversion. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting).

On reconsideration *en banc*, the Board affirmed its decision that employer's' LS-202 form, First Report of Injury, is inadequate to meet the requirements of a notice of controversion under Section 14(d). It does not state that the right to compensation is controverted or the grounds therefor as is required by the statute. The Board also is persuaded by claimant's contention that it was not employer's intent to controvert the claim with this form at the time it filed it, because it was relying on the deputy commissioner's "excuse" from filing controversions, etc. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 346 (1992) (*en banc*) (Brown, J., dissenting), *aff'g on recon.* 25 BRBS 345 (1991) (Brown, J., dissenting).

The Board holds that the validity of employer’s notice of controversion is to be determined with reference only to the contents of the notice itself. The Board rejected the Director’s contention that the administrative law judge should assess its validity with reference to employer’s other actions and filings, as the Fourth Circuit requires for motions for modification (*Pettus, Greathouse, Borda*). Rather, as with a claim for compensation (*Craig*, *Alario*), the sufficiency of employer’s notice of controversion is determined by the document alone, *i.e.,* whether it complies with Section 14(d)’s requirement that the notice state the grounds upon which the right to compensation is controverted. As employer’s notice in this case stated the reasons, the Board held that the notice of controversion was valid. Moreover, as the notice was timely filed, employer is not liable for a Section 14(e) assessment. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS (2004).

After reviewing the administrative review scheme of longshore cases and legislative history of the Act, the Third Circuit held that if this scheme is inadequate to address a "wholly collateral claim," district court jurisdiction is not precluded over that claim. In this case, Kreschollek challenged the constitutionality of Section 14 of the Act - specifically, whether he was deprived of his due process rights due to lack of a hearing before voluntary benefits were terminated by the filing of a notice of controversion. Acknowledging that the legislative history and administrative scheme preclude district court jurisdiction over ordinary challenges, the court concluded that because Kreschollek had alleged a sufficiently serious irreparable injury--lack of a pretermination hearing-- such is a matter of constitutional right that the administrative process is inadequate to afford him full relief; therefore, district court jurisdiction is not precluded in this instance. Further, the court held that the district court's exercise of jurisdiction over this collateral claim would have no bearing on the merits of Kreschollek's claim of entitlement to benefits. *Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868, 30 BRBS 21 (CRT) (3d Cir. 1996).

Third Circuit affirms the district court's holding that the government did not deny claimant's rights to due process when employer unilaterally suspended his longshore benefits as there was no government action involved, and claimant did not have a property interest in the continued receipt of these benefits. The Third Circuit found the Supreme Court's holding in *American Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) controlling, wherein the Court held that there is no state action when an employer terminates its voluntary payment of benefits, and that an employee has no property interests in unadjudicated benefits under the Pennsylvania workers' compensation statute. Third Circuit rejects claimant's contention that because there is pervasive regulation of workers' compensation by the Longshore Act there is necessarily state action. *Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3$^{d}$ Cir. 2000).

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## Section 14(e)

### In general

The Board affirmed the administrative law judge's finding that a Section 14(e) assessment should not be imposed because the employer timely controverted the claim. Denton v. Northrop Corp., 21 BRBS 37 (1988).

Interest is not due on Section 14(e) assessment. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993); Cox v. Army Times Publishing Co., 19 BRBS 195 (1987).

The Board rejects the argument that the Section 14(e) penalty applies to accrued unpaid medical, as well as disability, benefits. Plain language of Section 14 limits its application to "installments" of compensation benefits, which medical benefits are not. Since Section 14(e) provides for a mandatory assessment of additional compensation, it may be initially raised at any time. Scott v. Tug Mate, Inc., 22 BRBS 164 (1989).

The Board vacates the deputy commissioner's excuse granted under Section 14(e), on the ground that it was not based on a showing that employer was prevented from making payments or filing notices because of circumstances beyond its control. In addition, the Board reiterates that the purposes of Section 14(e) are to encourage the prompt payment of benefits and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the attention of the Department of Labor. It is not relevant that claimant is a retiree for whom the benefits are not a source of "replacement income." Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989)(en banc) (Brown, J., concurring), aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990).

The Fifth Circuit affirmed the Board's holding that the deputy commissioner abused his discretion in failing to assess a Section 14(e) penalty against employer where employer failed to cite circumstances beyond its control in failing to file a timely notice of controversion. The Fifth Circuit affirmed the Board's holding that retirees are entitled to receive Section 14(e) penalty awards as the penalty is designed, in part, to encourage employers to notify the Department of Labor of compensation disputes. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), aff'g in pert. part and rev'g on other grounds Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), and Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262 (1989) (en banc) (Brown, J., concurring).

Employer's good faith in voluntarily paying benefits at an average weekly wage it believed to be correct is not relevant to Section 14(e). The administrative law judge's denial of a Section 14(e) penalty due to employer's good faith is therefore reversed. Browder v. Dillingham Ship Repair, 24 BRBS 216, aff'd on recon., 25 BRBS 88 (1991).

The Board held that employer could not have detrimentally relied on the "excuse" granted by the deputy commissioner due to the large number of cases filed at one time, as employer's knowledge of the injury, and not its receipt of the claim from the deputy commissioner triggered its duty to pay or controvert. Employer's late payment, therefore, was not excused, and the administrative law judge properly applied a 10 percent penalty pursuant to Section 14(e). The Board rejected employer's contention that Section 14(e) is inapplicable in the instant case because claimant was not being compensated for a loss in wage-earning capacity but for his scheduled hearing loss. The Board notes that the purposes of Section 14(e) are to encourage the prompt payment of benefits and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the attention of DOL. *Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992).

The Board notes that federal pre-emption applies to the Act in general. However, it held that the administrative law judge unnecessarily applied pre-emption in determining that the state-created insurance fund, FIGA, which is expressly relieved of liability for interest and penalties under Florida law, is not liable for interest and a Section 14(e) penalty under the Act. The Board held that the Florida statute merely limits the liability of FIGA and does not deny claimant any of his rights under the Act. The Board reversed the administrative law judge and determined that employer is liable for interest and the Section 14(e) penalty under Section 4 of the Act under the rationale of *B.S. Costello*, 867 F.2d 722, 22 BRBS 24 (CRT)(1st Cir. 1989). *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

The Federal Circuit holds that payments employer made under Section 14(e) were “additional compensation” under the Act and not “fines and penalties,” nor were they a form of interest. The court noes other sections of the Act where the word “fine” or “penalty” is expressly used. Thus, payments made pursuant to Section 14(e) were chargeable to Ingalls’ Navy contracts. *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Fed. Cir. 1997).

The Fifth Circuit rejects employer's contention that the administrative law judge erred in assessing a Section 14(e) penalty based on the date the parties stipulated that employer filed a notice of controversion. Employer contended the administrative law judge overlooked an earlier notice of controversion. The court held employer bound by its stipulation, and thus affirmed the imposition of the Section 14(e) penalty as the form was not filed within 14 days of employer's having notice of the injury. The Fifth Circuit declines to address employer's contention that its notice of final payment form satisfies the prerequisites for a notice of controversion such that it is not liable for a Section 14(e) penalty. Employer did not raise this issue before the Board, and the court therefore is precluded from addressing the issue. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

Principles in Establishing Liability

Voluntary Payments-Controversy

Where the record fails to indicate the date upon which employer ceased making voluntary payments of compensation to claimant, claimant has failed to establish entitlement to a Section 14(e) assessment. Olson v. Healy Tibbits Construction Co., 22 BRBS 221 (1989).

Board holds that under Section 6(d) of the Act as amended in 1972, the "phase-ups" of Section 6(b)(1), under which the maximum amount of weekly compensation to which a claimant is entitled is increased each year, are applicable to all claimants "newly awarded compensation"--i.e., to all claimants awarded compensation after Section 6(d)'s enactment date--including those newly awarded compensation for temporary total disability. Board accordingly upholds administrative law judge's imposition of a Section 14(e) assessment for employer's failure to increase the amount of compensation it was paying claimant, in accordance with Section 6(b)(1), during the period that it was making voluntary payments. West v. Washington Metropolitan Area Transit Authority, 21 BRBS 125 (1988).

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The Board rejects claimant's contention that the administrative law judge erred in denying her an additional assessment from the Special Fund pursuant to Section 14(e). Claimant had argued that because the Special Fund was paying permanent total disability compensation at the time of death and was aware under Graziano that it was liable for the payment of death benefits, as a matter of law inasmuch as employer had already paid 104 weeks of disability compensation, it acted in bad faith in terminating its compensation payments and in failing to begin payment of death benefits as of the date of the employee's death. Board agreed with the Director that pursuant to Brady, 13 BRBS 1044 (1981), employer's timely filing of a notice of controversion prevented the Special Fund from becoming liable for any additional assessment under Section 14(e). Bingham v. General Dynamics Corp., 20 BRBS 198 (1988).

The Board rejects claimant's argument that employer was required to file another notice of controversion after terminating its voluntary payment of benefits on July 24, 1983. Since an informal conference was held on July 29, 1983, this date is deemed to be the date on which the department knew of the facts a proper notice would have revealed. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988).

The Board rejects the argument that there is no "controversy" for purposes of Section 14(e) until a claim is filed; employer must controvert the claim within 14 days of its awareness of the injury. Moreover, the filing of a timely answer to a state claim doe not excuse employer's liability under Section 14. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

The Board rejects employer's argument that the penalty should only apply to unpaid compensation that accrued after claimant notified employer that she contested employer's average weekly wage computation from the date of injury. As of the date claimant notified employer, a dispute existed between the parties and employer then had 28 days to pay the additional compensation claimed or 14 days in which to controvert the claim, neither of which employer did. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.,* 25 BRBS 88 (1991).

The Board affirms its holding that employer is liable for a Section 14(e) penalty from the date of injury, rather than the date claimant notified employer that she disputed its calculation of her average weekly wage. Although the dispute did not arise until over 2 years after the date of injury, the amount claimant initially contested extended back to the date of injury. The Board rejects employer's argument that *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1228 (9th Cir. 1979) is controlling in this case, which arises in the Ninth Circuit. *Bonner* is distinguishable because the initial dispute in that case arose over the employer's reduction in the amount of its voluntary compensation payments subsequent to the date of injury. The Ninth Circuit held that the Section 14(e) penalty applied only to the amount in controversy pertaining to this dispute. Unlike *Bonner*, where the average weekly wage issue did not arise until the formal hearing, in the instant case, employer could have timely controverted claimant's original claim to benefits at a higher weekly wage extending back to the date of injury. *Browder v. Dillingham Ship Repair*, 25 BRBS 88, *aff'g on recon.* 24 BRBS 216 (1991).

Where employer timely controverted the hearing loss claim filed by claimant and began voluntary payments of benefits within 14 days after payment was due, the Fifth Circuit held that employer was liable for neither pre-judgment interest nor a Section 14(e) penalty. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

Timely Controversion-Employer Knowledge

The administrative law judge properly found that employer is not liable for a Section 14(e) assessment. Although employer never controverted the 1983 claim, the Board held that the 1979 claim remained open, and that employer controverted this claim in a timely manner. Since the two claims are treated as one for adjudication purposes, employer's timely controversion of the 1979 claim is sufficient to prevent a Section 14(e) assessment from being imposed on the award. *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990).

Although employer did not controvert the 1983 claim within 14 days, its advance payment of compensation in 1980 acted as payment on the 1983 claim, thus fulfilling its obligation to pay compensation within 14 days as required by Section 14(e). This finding by the administrative law judge is adopted by the court instead of the reasoning provided by the Board. *Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990), *aff'g Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989).

Employer's knowledge of the claim for purposes of Section 14 is determined under the same standard as employer's knowledge of injury under Section 12(d). Scott v. Tug Mate, Inc., 22 BRBS 164 (1989).

A notice of suspension filed within 14 days of the cessation of payments by an employer to claimant, which provides the information required by Section 14(d) of the Act, is the functional equivalent of a notice of controversion and precludes application of an

assessment pursuant to Section 14(e). *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

The Board rejected employer's contention that it is not liable for a Section 14(e) penalty until it had notice of a claim under the Act, as opposed to knowledge of a state claim, because before this it did not know a controversy existed. Section 14(e) provides that employer must either pay compensation or controvert employer's entitlement within 14 days of its knowledge of the injury, not its knowledge that a claim has been filed under the Act. *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

Where carrier did not controvert liability within 14 days of knowledge of claimant's injury and did not pay compensation voluntarily, a Section 14(e) penalty is imposed from decedent's date of death until the informal conference. Board rejects carrier's argument that under Section 3(e) of the Act, its payment under state workers' compensation settlement could be used to offset its liability. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

In this case, claimant received a 1988 audiogram which revealed a hearing loss. She continued to work and be exposed to injurious noise and did not file a notice of injury or claim for compensation until after a 1994 audiogram revealed an increased hearing loss. In reversing the administrative law judge's award of a Section 14(e) penalty on the 31.88% impairment shown in 1988, the Board held that, on the facts of this case, employer is not liable for the penalty because the full extent of claimant's injury was not known until 1994. Specifically, employer must have knowledge of the full extent of the injury or aggravation for which compensation is to be paid before Section 14(e) applies. In 1988, employer had no knowledge of the loss ultimately claimed; therefore, no controversy arose at that time, and it cannot be held liable for failing to pay benefits or to file a notice of controversion. As employer timely controverted the claim filed in 1994, it is not liable for a Section 14(e) penalty. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

The Board rejected claimant's contention that employer was required to file a notice of controversion at the time employer alleged that claimant reached maximum medical improvement and that suitable alternate employment was available in December 1994. Employer paid benefits from the date of injury in 1990 until May 1996, and its notices of controversion in Feb. 1996 and cessation of benefits in June 1996 were timely filed. *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).

The Board holds that the validity of employer's notice of controversion is to be determined with reference only to the contents of the notice itself. The Board rejected the Director's contention that the administrative law judge should assess its validity with reference to employer's other actions and filings, as the Fourth Circuit requires for motions for modification (*Pettus, Greathouse, Borda*). Rather, as with a claim for compensation (*Craig*, *Alario*), the sufficiency of employer's notice of controversion is determined by the document alone, *i.e.,* whether it complies with Section 14(d)'s requirement that the notice state the grounds upon which the right to compensation is controverted. As employer's notice in this case stated the reasons, the Board held that the notice of controversion was valid. The Board further holds that the notice was timely filed as it was filed within 14 days after claimant first obtained a permanent impairment rating. Thus, the Board holds that employer is not liable for a Section 14(e) assessment. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS (2004).

Period of Assessment

A Section 14(e) assessment is properly imposed on only those compensation installments which were due prior to the employer's filing of a notice of controversion. Interest is imposed on only overdue compensation payable to claimant, rather than on an amount including both overdue compensation and a Section 14(e) assessment. The Board reasoned that the purpose of awarding interest would not be furthered by imposing interest on Section 14(e) assessments. McKamie, 7 BRBS 315 (1977), in which the Board had allowed interest on unpaid Section 14(f) penalties, was distinguished. Cox v. Army Times Publishing Co., 19 BRBS 195 (1987).

Claimant is entitled to a Section 14(e) assessment on all unpaid or untimely paid benefits until the time that a notice of suspension of benefits is filed. Notice of suspension is equivalent to a notice of controversion. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

A Section 14(e) assessment terminates on the date of employer's filing of the Notice of Controversion. Scott v. Tug Mate, Inc., 22 BRBS 164 (1989).

Under Section 14(e), where claimant is awarded back benefits for an occupational disease which caused impairment before it became manifest and where employer fails to either pay compensation within 14 days of notice of the injury or timely controvert the claim, claimant is entitled to a 10 percent assessment on the entire award of back benefits. Kocienda v. General Dynamics Corp., 21 BRBS 320 (1988).

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Employer is liable for a Section 14(e) penalty on all compensation due and unpaid from the date of injury until the informal conference is held. The Board rejects employer's argument that the penalty should only apply to unpaid compensation that accrued after claimant notified employer that she contested employer average weekly wage computation from the date of injury. As of the date claimant notified employer, a dispute existed between the parties and employer then had 28 days to pay the additional compensation claimed or 14 days in which to controvert the claim, neither of which employer did. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.,* 25 BRBS 88 (1991).

The Board affirms its holding that employer is liable for a Section 14(e) penalty from the date of injury, rather than the date claimant notified employer that she disputed its calculation of her average weekly wage. Although the dispute did not arise until over 2 years after the date of injury, the amount claimant initially contested extended back to the date of injury. The Board rejects employer's argument that *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1228 (9th Cir. 1979) is controlling in this case, which arises in the Ninth Circuit. *Bonner* is distinguishable because the initial dispute in that case arose over the employer's reduction in the amount of its voluntary compensation payments subsequent to the date of injury. The Ninth Circuit held that the Section 14(e) penalty applied only to the amount in controversy pertaining to this dispute. Unlike *Bonner*, where the average weekly wage issue did not arise until the formal hearing, in the instant case, employer could have timely controverted claimant's original claim to benefits at a higher weekly wage extending back to the date of injury. *Browder v. Dillingham Ship Repair*, 25 BRBS 88, *aff'g on recon.* 24 BRBS 216 (1991).

Where employer fails to file a Notice of Controversion, employer's liability under Section 14(e) terminates when DOL knows of the facts that a proper notice of controversion would have revealed. In this case, where no informal conference took place, the Board found that DOL had the requisite knowledge when the case was referred to the OALJ for a formal hearing. Although claimant had filed his LS-18 pre-hearing form prior to the referral date, the Board stated that it was employer's burden to bring any dispute to the attention of DOL. Although employer did not file its pre-hearing statement until subsequent to the referral date, the Board held that this was immaterial because DOL's action in referring the case for a formal hearing indicated that the Department had knowledge that the claim was being disputed at that time. *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992).

14-12g

If employer does not timely pay benefits or controvert the claim after receipt of claimant's notice of injury, a Section 14(e) penalty applies to all benefits "due and unpaid" including benefits that accrued in the period between the time of injury and the date employer receives notice. In this Section 8(c)(13) case, benefits were due from the date of injury, which in this case is the date of the first audiogram, and as the entire award ran out before employer paid or controverted, the Section 14(e) penalty applies to the entire award. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon*., 27 BRBS 218 (1993).

The Ninth Circuit vacated the administrative law judge's denial of a Section 14(e) penalty and remanded the case for him to determine the date on which the notice of controversion requirement was triggered as the administrative law judge failed to identify a specific date. After determining the triggering date, the administrative law judge was instructed to assess the appropriate 10% penalty with respect to the period commencing with the triggering date, not earlier than December 8, 1989, when the employer unilaterally discontinued benefit payments, and ending on December 31, 1990, when claimant's attorney spoke with employer's claims manager and informed him of the dispute. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

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## Section 14(f)

### Board Jurisdiction

The Board lacks jurisdiction to address assessment of Section 14(f) penalty when deputy commissioner has not yet considered the issue. *Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989); *Von Lindenberg v. I.T.O. Corp. of Baltimore*, 19 BRBS 233 (1987).

In an unpublished opinion, the United States Court of Appeals for the D.C. Circuit agreed with the Board that it retains jurisdiction where employer pays all compensation due, and thus no default order is issued. The court reversed Board's decision that the timely filing of a motion for reconsideration of an administrative law judge's decision stays the imposition of a penalty. A timely motion for reconsideration does not postpone the date on which an award "becomes due" for purposes of assessing a Section 14(f) penalty. For purposes of Section 14(f), an award "becomes due" when it is "effective" within the meaning of Section 21(a) of the Act--i.e., when it is filed in the deputy commissioner's office. Rucker v. Lawrence Mangum & Sons, Inc., 830 F.2d 1188 (D.C. Cir. 1987)(table), rev'g 18 BRBS 74 (1986).

The Board retains jurisdiction of cases involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring Section 18 enforcement. The Board held, however, that it will not follow the rationale of its prior decision in *Rucker*, 18 BRBS 74, and thus a timely motion for reconsideration will not toll the 10-day period for paying benefits under Section 14(f). *McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989).

The Board has jurisdiction over appeal where deputy commissioner denies Section 14(f) compensation, as Section 18 does not apply where no default order is issued. Durham v. Embassy Dairy, 19 BRBS 105 (1986).

The Board held that it had jurisdiction to decide whether employer was liable for a Section 14(f) penalty. Although Section 18(a) states that a default on the part of employer is enforceable in federal district court, the Board retains jurisdiction of cases which involve only questions of law regarding the propriety of assessing Section 14(f) penalties, and which do not require enforcement of default orders. Since no default order had been issued in this case, the Board addressed claimant's Section 14(f) argument. *Lynn v. Comet Construction Co.*, 20 BRBS 72 (1986).

The Board has jurisdiction over the Section 14(f) issue when employer has paid the compensation and the penalty, and thus there is no basis for proceedings under Section 18. Inasmuch as the Board reversed the award of benefits, the Board reversed the award of a Section 14(f) penalty. *Jennings v. Sea-Land Service, Inc.,* 23 BRBS 12

(1989), *vacated on recon.*, 23 BRBS 312 (1990).

On reconsideration, the Board held that claimant is entitled to compensation. Since the filing of a timely motion for reconsideration does not toll the 10-day period for payment of compensation, the Board holds that claimant is entitled to a Section 14(f) penalty. *Jennings v. Sea-Land Service, Inc.,* 23 BRBS 312 (1990), *vacating on recon.* 23 BRBS 12 (1989).

The Board will not address a claimant's request for a Section 14(f) penalty which is raised only in his response brief, and not in a cross-appeal. Castronova v. General Dynamics Corp., 20 BRBS 139 (1987).

The Third Circuit rejects the Director's contention that the Board is without jurisdiction to review the imposition of a Section 14(f) penalty where employer has paid the penalty. The Director's logic would require employer to deliberately withhold payment in order to force claimant to seek enforcement in district court under Section 18, which runs counter to the philosophy of the Act. Once the award has been paid, review is unavailable under Section 18, and the propriety of the assessment is properly before the Board under Section 21(c). *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993).

In an appeal taken from the district director's Supplementary Compensation Order, the majority holds that it has jurisdiction to decide the appeal inasmuch as the district director's order involved only a question of law regarding the propriety of a Section 14(f) penalty and did not require enforcement of that penalty pursuant to Section 18(a). *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

The Board discussed the regulation at 20 C.F.R. §702.372 in relation to the enforcement of a Section 14(f) penalty assessment. It determined that this regulation, which allows for a hearing, applies only when there is no agreement on the amount of the compensation due under the initial compensation order. If a factual matter is raised regarding the compensation due which must be resolved before the district director can issue a default order, the case is properly decided by an administrative law judge. In this case, the dispute centered on the propriety of the Section 14(f) penalty itself, as employer alleged its payment was not made in 10 days due to claimant’s concealing his correct address. The Board affirms the administrative law judge’s dismissal of the claim, as there is no dispute with the original compensation order or the amount in default. Under these circumstances, sole authority rests with the district court, pursuant to Section 18, to determine whether the default order was issued in accordance with law, and employer may raise its defenses when claimant seeks enforcement of the default order in district court. *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000).

14-15b

The D.C. Circuit held that the Board does not have jurisdiction to address a supplementary compensation order declaring payments in default issued pursuant to Section 18(a) of the Act. Specifically, in this case, the OWCP issued a supplementary compensation order finding employer/carrier in violation for failure to make payments of benefits pursuant to *Brandt/Holliday*, and it awarded claimant a Section 14(f) penalty of 20% of the shortfall. Because employer/carrier raised the issue of whether claimant's benefits were subject to cost-of-living adjustments under Section 10(f) pursuant to *Brandt/Holliday*, and because this issue had not been addressed previously, the Board took the position that the Section 10(f) payments were not the subject of a compensation order and were properly before it for the first time; following *Bailey*, 32 BRBS 76 (1998), the Board held that prospective benefits are not subject to Section 10(f) adjustments. The court vacated the Board's order, holding that employer did not timely challenge the Section 10(f) issue, and that the Board lacks jurisdiction to address issues raised in a default order. *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 1988 (2002).

Factors Affecting Imposition of the Penalty

The Fifth Circuit held that where the compensation order of the administrative law judge provided that employer was to receive a credit for wages paid but did not specify the amount of the credit or provide a method of computation based on facts in the record, the order was not a "final decision" which was "due" and "effective," and employer's failure to pay compensation under the decision accordingly did not subject it to Section 14(f) liability. Thus, a United States district court properly declined to enforce a default order issued by the deputy commissioner, pursuant to Section 18(a) of the Act, requiring employer to pay a Section 14(f) penalty. *Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21 (CRT) (5th Cir. 1990).

The Fifth Circuit holds, consistent with *Severin*, that an administrative law judge's decision does not become final and enforceable until the deputy commissioner furnishes the calculations directed by the decision. That fact that employer could have made the calculations on its own is not determinative in this case in view of the specific directive that the deputy commissioner make the calculations. Thus, the district court properly declined to enforce the assessment of a Section 14(f) penalty for late payment. *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110 (CRT) (5th Cir. 1994).

The Fifth Circuit holds that when determining whether compensation was timely paid, the district court properly excluded intermediate Saturdays and Sundays under FRCP 6(a). The FRCP apply because a Section 14(f) assessment is a supplementary default order within the meaning of Section 18(a). *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (CRT), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

14-15c

The Fourth Circuit disagrees with *Quave* and holds that compensation payments must be made within 10 calendar day, not business days, in order to avoid a Section 14(f) penalty. The court holds that the FRCP do not govern the computation of the 10-day period as Section 14(f) is not a "proceeding for enforcement or review" under Section 18 or 21. *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 28 BRBS 118 (CRT) (4th Cir. 1994).

The Board adopted the reasoning of the Fourth Circuit in *Reid*, 41 F.3d 200, 28 BRBS 118 (CRT)(4th Cir. 1994), and held that FRCP 6(a) is not applicable to time computations under Section 14(f), since Section 14(f) is a substantive, not a procedural, provision. The Board held that the 10-day requirement contained in Section 14(f) means 10 calendar days, including Saturdays, Sundays and holidays. Thus, the Board reversed the administrative law judge's determination that employer is not liable for a Section 14(f) penalty, as employer's payment of benefits was made 12 days after the issuance of the administrative law judge's order approving the parties' settlement, and therefore, was untimely. *Irwin v. Navy Resale Exchange*, 29 BRBS 77 (1995).

Following its decision in *Irwin v. Navy Resale Exchange*, 29 BRBS 77 (1995), the Board rejected employer's contention that Rule 6(a) of the Federal Rules of Civil Procedure applies to Section 14(f), and held that the 10-day time limit under Section 14(f) means 10 calendar days. Thus, the Board affirmed the district director's finding that employer's payment of compensation to claimant on July 8, 1994, 11 days after it became due, was untimely under Section 14(f). *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

The court held that the unambiguous meaning of the 10-day requirement contained in Section 14(f) means 10 calendar days, including Saturdays, Sundays and holidays. The court further held that Rule 6(a) and Rule 81(a)(6) of the FRCP do not apply, as the calculation of the payment deadline under Section 14(f) cannot be characterized as an enforcement proceeding. Thus, the court affirmed the lower court's award of a Section 14(f) penalty where the claimant received payment from employer 13 days after it became due. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied,* 128 F.3d 801 (2d Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1839 (1998).

The Eleventh Circuit holds that employer is required to pay a compensation award to claimant within 10 calendar days, not 10 business days, to avoid a late penalty under 33 U.S.C. §914(f). The court noted that its decision is consistent with decisions of the First and Fourth Circuits and the Board. *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998).

The Board reversed the administrative law judge's determination that FRCP 6(e) provided employer with an extra three days in which to make compensation payments without incurring Section 14(f) liability. The Fifth Circuit, where this case arose, has held that Rule 6(e) -- which adds three days to the period within which a party must respond to a document, when the document is served on him by mail--is inapplicable to Section 14(f), because Rule 6(e) refers to the date on which a document is served, while Section 14(f) refers to the date on which a document is filed. The Board accordingly held Rule 6(e) inapplicable to the determination of whether employer was required to pay a Section 14(f) penalty. Lynn v. Comet Construction Co., 20 BRBS 72 (1986).

The Board vacated the deputy commissioner's Compensation Order denying assessment of additional compensation under Section 14(f) and remanded the case for entry of an award of penalty where claimant received his compensation check 15 days after it became due. The Board rejected employer's contentions that the penalty should be excused because employer made a good faith attempt to pay claimant in a timely manner, but mistakenly sent the check to the wrong address, that payment should be considered to have been made on the date the check was placed in the mail instead of the date claimant received it, and that employer should be given 3 extra days to make payment pursuant to FRCP 6(e). *Matthews v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 440 (1989).

Where the administrative law judge's decision awarding benefits was filed by the district director on January 15, 1991, and employer did not issue the check to claimant until January 30, 1991, the Board affirmed the administrative law judge's finding that employer is liable for a Section 14(f) penalty. The Board rejected employer's contention that FRCP 6(e) applies; this rule requires action within 10 days of service and adds 3 days to the prescribed period when service is accomplished by mail. Section 14(f), however, requires payment of benefits within 10 days of filing. Therefore, in accordance with *Lauzon*, 782 F.2d 1217, 18 BRBS 60 (CRT) (5th Cir. 1985), the Board that Rule 6(e) does not apply, thereby reaffirming *Matthews*, 22 BRBS 440 (1989), and *Lynn*, 20 BRBS 72 (1986). *Barry v. Sea-Land Services, Inc.*, 27 BRBS 260 (1993), *aff'd*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994).

The Board noted the common-law rule that when payment is sent by mail, the date of payment is the day it is received by the payee, and the Board determined that employer's payment of benefits on January 30, 1991 was untimely. Even assuming, *arguendo*, without deciding that FRCP 6(a) applies to 14(f) (noting the Director's contention that it does not), the Board held that payment must have been made by January 30, 1991, and there was no evidence in the record showing that claimant received payment by that date. Therefore, the Board rejected employer's Rule 6(a) argument and affirmed the administrative law judge's finding that it is liable for a Section 14(f) penalty. *Barry v. Sea-Land Services, Inc.*, 27 BRBS 260 (1993), *aff'd*, 41 F.3d

903, 29 BRBS 1 (CRT) (3d Cir. 1994).

14-15e

The Third Circuit holds that FRCP 6(e) does not apply to Section 14(f) inasmuch as Section 14(f) requires payment within 10 days of "filing," not "service" as contemplated by Rule 6(e). Moreover, the court rejects the contention that compensation is "paid" when the check is mailed rather than when it is received. *Sea-Land Services, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993).

The Board outlines the procedures regarding Section 14(f). Here, employer unilaterally suspended payments when claimant voluntarily returned to the work force prior to the issuance of a new compensation Order pursuant to Section 22. In so doing, employer risked incurring liability for an additional assessment under Section 14(f). However, since employer succeeded in getting claimant's initial total disability award reduced to partial, the Board held that it would be incongruous to require employer to pay a penalty on total disability benefits. Rather, employer would be responsible for a Section 14(f) penalty on all partial disability benefits due and not paid. Richardson v. General Dynamics Corp., 19 BRBS 48 (1986).

The Board vacates the Section 14(f) penalty assessed against employer when it unilaterally suspended payments upon claimant's becoming employed. The Board holds that claimant's failure to obtain employer's written approval prior to entering into a third-party settlement bars his entitlement to compensation, including that due during the period employer suspended compensation. As no past compensation is due, employer is not liable for a Section 14(f) penalty. The Board notes, however, that if, in a given case, it is determined that Section 33(g) is inapplicable, an employer's unilateral termination of compensation may entitle claimant to a penalty under Section 14(f) if claimant timely seeks a default order under Section 18(a). *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

The deputy commissioner acted irrationally in assessing a Section 14(f) penalty against Hanover Insurance Company for failure to pay the administrative law judge's award within 10 days since Hanover was not even a party before the administrative law judge and was not found liable until the deputy commissioner's subsequent Order. Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

Section 14(f) penalties are not imposed if a stay of payment has been issued, see 20 C.F.R. §702.350, or the order making the award of compensation is non-final. Deputy Commissioner's mailing of carrier's copy of administrative law judge's Decision and Order to incorrect address does not absolve employer from Section 14(f) penalty. Durham v. Embassy Dairy, 19 BRBS 105 (1986).

In a case of first impression, the Board held that claimant is not entitled to a Section 14(f) assessment on medical benefits that were not timely paid. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

The Board held that interest is "compensation" for purposes of Section 14(f), as this will ensure that all benefits intended to make claimant "whole" will be promptly paid by employer. Thus, if employer does not pay claimant interest under the terms of an award within 10 days after it becomes due, employer is liable for a Section 14(f) penalty. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) (Brown, J., dissenting), *aff'd and modified on other grounds on recon. en banc*, 28 BRBS 271 (1994), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996)*, cert. denied*, ____U.S. ___, 117 S.Ct. 1333 (1997).

Reversing its decision in *Sproull*, 25 BRBS 100 (1991) (Brown, J., dissenting), *aff'd in part and modified in part on other ground on recon. en banc*, 28 BRBS 271 (1994), the Board adopts Judge Brown's dissent and holds that as interest is not "compensation" provided under the Act, employer's failure to timely pay interest cannot serve as a basis for imposing a penalty under Section 14(f). The states that the holding that interest is not "compensation" is consistent with the plain language of Section 2(12), and with other cases construing the term in different sections of the statute, *e.g., Castronova*, 20 BRBS 139 (1987) (interest is not compensation under Section 14(j)); *Caudill*, 22 BRBS 10 (1988) (medical benefits are not compensation under Section 14(f). *Nelson v. Stevedoring Services of America*, 29 BRBS 99 (1995) (*en banc*). *But see Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996)*, cert. denied*, ____U.S. ___, 117 S.Ct. 1333 (1997) (affirming Board's *Sproull* decision on this point).

In affirming the Board's assessment of a 20 percent penalty for employer's late payment of interest, the Ninth Circuit adopted the Director's view that interest is a component of compensation necessary in order to make claimants whole. *Sproull v. Director, OWCP*, 86 F.3d 895, 900, 30 BRBS 49, 52(CRT)(9th Cir. 1996), *aff'g in pert. part Sproull v. Stevedoring Services of America,* 25 BRBS 100 (1991) (Brown, J., dissenting), *aff'd and modified on other grounds on recon.,* 28 BRBS 272 (1994)(*en banc*), ____U.S. ___, 117 S.Ct. 1333 (1997). *But see Nelson v. Stevedoring Services of America*, 29 BRBS 99 (1995)(*en banc*).

The Board reverses the district director's award of a Section 14(f) assessment based on employer's failure to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981) as *Holliday* was overruled by the Fifth Circuit in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc)* and as the D.C. Circuit, in whose jurisdiction this case arises, stated in *Brandt v. Stidham Tire Co.,* 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986) that it would accept *Holliday* until it was overruled by the Fifth Circuit. Consequently, the Board disavows the holding in *Holliday* and *Brandt* in Section 10(f) cases in the D.C. Circuit and follows *Phillips*. *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998). *But see Snowden v. Director, OWCP,* 253 F.3d 725, 35 BRBS 81(CRT)(D.C. Cir. 2001).

The administrative law judge's award approving a settlement was served on claimant at an incorrect address and employer mailed the check to this erroneous address, causing claimant to receive his compensation after the 10-day period under Section 14(f) expired. The court held that the claimant is "paid" when the check is received, not when it is mailed. Noting the harsh result, the district court ruled that Section 14(f) contains no equitable exceptions for late payment, and because more than 10 days had elapsed between the compensation order and the payment to claimant, the Section 14(f) penalty automatically attached. The court further ruled that the district director did not fail to follow the procedural requirements of Section 18(a). *Zea v. West State, Inc.*, 61 F.Supp.2d 1144 (D.Ore. 1999).

The Ninth Circuit holds that the Section 14(f) penalty is mandatory and self-executing; the statute does not allow consideration of equitable factors, though the court reserved judgment on a case presenting fraud or physical impossibility. The use of the mandatory term "shall" in Section 14(f) requires the district director to add the 20 percent penalty if he finds more than ten days has elapsed between the date the amount became due and the date it was received. Thus, the court stated that after the district director makes a factual determination that a penalty is due and owing, and issues a supplemental order of default, Section 18(a), which confers enforcement jurisdiction on the district court, provides that the district court's inquiry is solely whether the supplemental order of default is in accordance with law. Therefore, the court of appeals reversed the district court's holding which equitably estopped claimant from raising the Section 14(f) penalty, in the enforcement proceeding before it, where claimant received his compensation late because employer sent the check to an incorrect address provided by claimant. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT)(9$^{th}$ Cir. 2002).

14-15h

## Miscellaneous Sections

### Credit - Section 14(j)

The Act does not authorize offsetting benefits by amount of unemployment compensation that claimant may have received during period of disability. Marvin v. Marinette Marine Corp., 19 BRBS 60 (1986).

The Eleventh Circuit holds that since employer never notified the deputy commissioner that it had begun payment of compensation, as is required by Section 14(c), it would be inequitable to allow employer to credit the wages it paid claimant during the period for which claimant is entitled to total disability benefits against its liability for the total disability benefits. Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), aff'g and rev'g Patterson v. Savannah Machine & Shipyard, 15 BRBS 38 (1982) (Ramsey, C.J., concurring and dissenting).

The administrative law judge improperly denied employer a credit for a short-term disability non-occupational payment of $2,600 made before notification of the claim. As it was not clear from the record who paid the benefits, the self-insured employer or an independent insurance company, the Board remanded for clarification, re-asserting prior Board law that employer is not entitled to a credit if its non-occupational accident carrier actually made the payments. That carrier, however, could intervene to recover monies erroneously paid. Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

The Board determines that interest is not "compensation" within the meaning of Section 2(12) of the Act. Accordingly, given that Section 14(j) of the act allows an employer to credit its overpayments of compensation against only "compensation" later found to be due, Board holds that administrative law judge properly declined to allow employer to reduce its liability for awarded interest by the amount it had previously overpaid in compensation. Board additionally notes that granting employer a credit for its overpayments in this case would not further the underlying purpose of Section 14(j)--to encourage an employer to tender payments of benefits during the period of its employee's "greatest need"--since employer did not make the voluntary payments at issue until after an informal conference had been held. Castronova v. General Dynamics Corp., 20 BRBS 139 (1987).

Administrative law judge erred in failing to hold employer entitled to a credit for compensation paid pursuant to the deputy commissioner's recommendation. *Mason v. Baltimore Stevedoring Co.,* 22 BRBS 413 (1989).

The Board held that advance payments of compensation may not be credited against awarded medical expenses. An employer is limited to a credit against unpaid installments of compensation due under Section 14(j) and since medical expenses re not paid in installments and do not equate to compensation under Section 2(12), an employer may not reduce its liability for medical benefits by the amount of its voluntary disability payments. *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

The Fifth Circuit held that a second employer, found responsible for claimant's permanent total disability, is not entitled to a credit for sums paid by an earlier employer in settlement of a claim for permanent partial disability to a non-scheduled body part. The court distinguished the credit doctrine enunciated in *Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986)(*en banc*), which applies to successive scheduled injuries. *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

To the extent claimant received 10(f) adjustments from employer during periods of temporary total disability, he was overpaid. As Section 8(f) applies, the Special Fund may withhold an increment of claimant's periodic payments, and repay employer for its Section 10(f) overpayments in periodic installments. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988), aff'd, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), vacated on other grounds, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (en banc).

Section 14(j) allows the Board to order that an employer who has made an overpayment but is no longer liable for any future payments to be reimbursed from future payments by a third party--in this case, the Special Fund. *Phillips v. Marine Concrete Structures, Inc*., 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *aff'g* 21 BRBS 233 (1988), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*).

The Board held that the language of Section 44(c)(1) of the Act required the employer to make payment to the Special Fund, irrespective of the fact that the employer had already paid claimant benefits under a state workers' compensation act. Sections 3(e) and 14(j) were distinguished. *Wong v. Help Unlimited of Tampa, Inc.,* 19 BRBS 255 (1987).

Since the instant case involves only one award, and employer made voluntary advance payments of compensation to claimant in excess of the amount for which it was subsequently found to be liable due to the operation of Section 8(f), employer is entitled to a credit for its voluntary payment. Employer is entitled to the credit, rather than the Special Fund, and is to be reimbursed for its overpayment from the Special Fund. *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990).

The Second Circuit affirms the Board's holding that the money paid to claimant by employer pursuant to the unresolved 1979 claim was a voluntary advance payment of compensation. Since the amount paid by employer was greater than the sum for which it was subsequently found to be liable, employer is entitled to a credit for its overpayment pursuant to Section 14(j), and is entitled to reimbursement for its overpayment from the Special Fund due to the operation of Section 8(f). *Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990), *aff'g Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989).

Where employer made voluntary advance payments of compensation to
claimant in excess of the amount for which it was subsequently found liable due to the operation of Section 8(f), employer is entitled to a credit. The administrative law judge erred in awarding employer a credit for its overpayment to be offset against any future hearing loss claims filed by claimant, as employer is entitled to reimbursement from the Special Fund. The offset for the voluntary payments of compensation should be made on a dollar for dollar basis, and not on a percentage basis, in order to insure that claimant is fully compensation for his hearing loss. *Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc,* 23 BRBS 241 (1990)(Brown, J., dissenting).

Employer voluntarily paid claimants compensation for their first hearing loss claims. Claimants continued working for employer and filed second claims alleging an additional work-related hearing loss. The court held that where claimants did not have a pre-employment hearing loss and the payments previously made by employer were compensation for hearing losses suffered on the job, employer is not entitled to a credit for its initial payments against its liability for the injuries that resulted in claimants' second claims. Although, application of the credit doctrine or Section 14(j) protects employers against double payments to an employee for an overall disability, Section 8(f) does not further protect employer in the case of a disability resulting exclusively from a work-related injury. Accordingly the credit for previous payments made by employer should be applied first to the liability of the Special Fund. *General Dynamics Corp. v. Director, OWCP [Blanchette]*, 998 F.2d 109, 27 BRBS 58 (CRT) (2d Cir. 1993).

The Board held, based on the facts of this case and the union contract in effect which provided for the payment of holiday pay "in lieu of compensation", that the administrative law judge erred in finding payments under the holiday pay provision constituted a "fringe benefit." Rather, the Board held that employer was entitled to credit its liability for compensation under the Act for its payment of "holiday pay" under the union contract. The Board held that, based on the facts of this case, claimant incurred no wage loss on the days he received holiday pay and therefore employer was not required to pay him compensation under the Act on those days. *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990).

The Board held that employer is entitled to a credit for its disability payments on the days employer paid claimant holiday pay under the contract. The Board, however, affirmed the administrative law judge's denial of a credit for vacation pay paid during the period of temporary total disability and vice versa inasmuch as claimant qualified for and earned his vacation in the prior year. Vacation pay is dissimilar from holiday pay as it is not paid out for a specific day, but is earned over the course of a year based on various factors. *Sproull v. Stevedoring Services of America,* 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in part and modified in pert. part on recon. en banc*, 28 BRBS 271 (1994), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996).

The Board reversed its prior determination and held that employer is not entitled to a credit for disability compensation paid to claimant on days claimant also received holiday pay. This case is distinguishable from *Andrews* in that there is no provision in the contract that holiday pay is to be in lieu of compensation. Moreover, had claimant not been injured he could have worked and received both his salary and holiday pay. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994) (*en banc*), *aff'g in part and modifying in pert. on recon. en banc* 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996).

The Ninth Circuit rejected employer's contention that its liability to claimant should be offset by vacation and holiday pay it paid to claimant while he was receiving temporary total disability benefits. The court noted that under the terms of the collective bargaining agreement, claimant would have received both wages and holiday pay if he could have worked on the holidays, and that vacation pay is not based on an employee actually taking a vacation. *Sproull v. Director, OWCP*, 86 F.3d 895, 899, 30 BRBS 49, 51(CRT)(9th Cir. 1996), *aff'g in pert. part Sproull v. Stevedoring Services of America,* 28 BRBS 272 (1991) (*en banc*), *modifying in pert. part* 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds).

The Board reverses the administrative law judge's finding that employer is to be credited for vacation, holiday and container royalty payments claimant received after his injury against its liability for compensation. There is no evidence that these payments were intended to be in lieu of compensation as in *Andrews*, which is the only basis under the Act for awarding employer a credit under Section 14(j). Claimant earns the right to these payments even if he is disabled and his entitlement to them stems from the collective bargaining agreement. *Branch v. Ceres Corp.,* 29 BRBS 53 (1995), *aff'd mem.,* 96 F.3d 1438 (4th Cir. 1996)(table).

Post-injury receipt of holiday pay during a period of temporary total disability does not represent the capacity to earn wages, and thus does not constitue a post-injury wage-earning capacity. Ttherefore, employer is not entitled to an offset for the worker's receipt of holiday pay against its liability for temporary total disability benefits. *Eagle Marine Services v. Director, OWCP (Wolfskill)*, 115 F.3d 735, 31 BRBS 49 (CRT) (9th Cir. 1997).

In accordance with *Eagle Marine* and *Branch*, the Board affirmed the administrative law judge's conclusion that claimant's vacation, holiday, and container royalty payments, received during the period of his temporary total disability, do not constitute wages within the meaning of Section 2(13) and have no impact on claimant's post-injury wage-earning capacity. Employer therefore is not entitled to a credit for claimant's receipt of these payments. *Wright v. Universal Maritime Service Corp.*, 31 BRBS 195 (1997), *aff'd and remanded,* 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998).

The Eleventh Circuit holds that employer is not entitled to a credit for post-injury container royalty and holiday/vacation payments made to claimant under a union contract as employer presented no evidence that such were intended as advance payments "in lieu of compensation" as required under Section 14(j); indeed, the court concluded that because such payments were paid regardless of whether an employee is disabled belies a finding that they were intended as advance payments of compensation. *SEACO v. Richardson*, 136 F.3d 1290, 32 BRBS 56(CRT) (11th Cir. 1998).

The Board reversed the administrative law judge's finding that employer is entitled to a credit for income claimant earned from other employers subsequent to March 31, 1995, as the Act contains no provision which entitles employer to a credit for income earned from other employers, and such an award would contravene both Section 8(h) of the Act and the administrative law judge's finding that claimant has a residual wage-earning capacity of $170 per week. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

The Fifth Circuit held that where employer overpays compensation to claimant it may not deduct the amount of overpayment from an award of attorney's fees to claimant's counsel. Payments to claimant's counsel is not considered "compensation" under the Act. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82 (CRT) (5th Cir. 1990).

The Board rejects employer's argument that it is entitled to reimbursement of its voluntary payments of compensation. Since claimant was found not to have suffered an injury at work, he is not entitled to further compensation, and Section 14(j), which allows for a setoff of voluntary payments against compensation due, does not authorize reimbursement. *Cooper v. Ceres Gulf*, 24 BRBS 33 (1990).

None of the three sections of the Longshore and Harbor Workers' Compensation Act which provide for recovery of overpayments (Sections 14(j), 8(j) and 22) provides for the employer recovering overpayments directly from the employee; such recovery can only be an offset against future compensation under the Act. *Ceres Gulf v. Cooper,* 957

F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992).



Section 14(j) allows employer a credit for its prior payments of compensation against any compensation subsequently found due, but evinces a congressional recognition that there might not be any unpaid installment to recover. Thus, Section 14(j) does not provide an employer with a right of repayment for an alleged overpayment of compensation. *Stevedoring Services of America, Inc. v. Eggert,* 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3056 (1992).

Employer's argument that it should be reimbursed for sums paid to claimant pursuant to the administrative law judge's Decision and Order is rejected. There is no basis for reimbursement under the Act. *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992).

The Act does not provide a federal remedy for employers to recoup overpayments of compensation. The legislative history of Section 14(j) confirms that Congress intended to preclude methods of recoupment other than offsets against future benefits. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

In three separate sections, the Act provides that the employer may recover past payments from an employee, but only by offsetting those payments against future compensation payments still due. *See* 33 U.S.C. §§ 908(j), 914(j), 922. Citing *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992), the Fifth Circuit noted that there is no separate cause of action to reinforce a reimbursement order against an employee when no future compensation payments are due; this is true even if the employee has engaged in fraud to obtain the medical benefits, *see* 33 U.S.C. §931(a). Although the holding in *Ceres Gulf* relates only to the employer's right to recover past payments from an employee, the court stated that similar provisions in the Act and legislative history compel a conclusion that employer is foreclosed from bringing an action for reimbursement against medical care providers even if the medical provider engaged in fraud so as to disqualify him from participating in the system, *see* 33 U.S.C. §907(c)(1)(C), although these factors were not present in the case before the court. *Petroleum Helicopters, Inc. v. Nancy Garrett, L.P.T.*, P.C., 23 F.3d 107, 28 BRBS 40 (CRT) (5th Cir. 1994).

In a case of first impression, the Board held that employer is not entitled to reduce its liability for compensation due for a subsequent work-related injury by crediting an overpayment of compensation made for a prior, unrelated work injury. *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993).

The Board reversed the administrative law judge's holding that the carrier's cost-of-living adjustments, erroneously made pursuant to a state workers' compensation statute, were not "advance payments of compensation" pursuant to Section 14(j). The Board allowed employer to credit the excess payments, mistakenly made to claimant's federal longshore award, against subsequent payments due until the overpayment is recouped. Although the administrative law judge found that Section 14(j) is not applicable to excess payments made after an award is in effect, the Board looked to the plain language of Section 14(j) and held that it did not require that a overpayment can be recouped only if it is voluntarily made prior to the entry of an award. *Flynn v. John T. Clark & Sons*, 30 BRBS 73 (1996).

The Board reversed the administrative law judge's finding that employer is entitled to a credit for vacation and holiday payments it made to decedent while he was disabled after his injury under Section 14(j). Since the union contract in the instant case does not specifically provide that vacation and holiday payments are intended to be in lieu of compensation, they are not intended as advance payments of compensation; rather, they are likened to wages paid under an employer-sponsored salary continuance plan. Thus, these payments are not subject to a credit under Section 14(j). *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165, 168 (1996).

The Fifth Circuit affirmed the administrative law judge's determinations that the twenty-six weeks of full pay provided to claimant under employer's SDB Plan were intended to be advance payments of compensation but that the subsequent twenty-six weeks of half-pay under the same program were not compensation payments within the scope of Section 14(j). Accordingly, the Fifth Circuit modified the administrative law judge's determination to reflect employer's entitlement to full credit, rather than the 2/3 credit which the administrative law judge found applicable, for the full-wage payments, and affirmed the administrative law judge's finding that the half-wage payments were not to be offset. *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1563 (1998).

The Board held that the net proceeds of a third-party settlement under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51, may provide the basis for a credit against an employer's compensation liability. The Board notes that while the FELA settlement recovery does not fall within the enumerated provisions of the Act which pertain to third-party settlements and advance payments of compensation, such as Section 14(j), a credit from the net amount of the FELA recovery is based on an independent credit doctrine which exists in case law to provide employers with an offset to prevent double recovery. Applying the credit in this case consistently with that obtained pursuant to Sections 3(e) and 33(f) of the Act, the Board also rules that employer is entitled to a credit only in the net amount of the FELA settlement. *Jenkins v. Norfolk & Western Ry. Co.*, 30 BRBS 109 (1996).

For the reasons stated in *Jenkins*, 30 BRBS 109 (1996), the Board affirmed the administrative law judge's granting of an offset for the net amount claimant received in a prior FELA settlement, a figure reached after subtracting claimant's attorney's fee in the FELA action. The Board rejected employer's contention that it is entitled to a credit for payments claimant received from the Railroad Retirement Board. The Board held that these payments are retirement benefits, not workers' compensation benefits, and thus are not subject to a credit under Section 3(e) of the Act. *Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998), *rev'd mem.,* 7 Fed. Appx. 156 (4th Cir. 2001).

In *dicta*, the Fourth Circuit holds that employer is not entitled to be reimbursed under Section 14(j) for payments made to claimant under a FELA settlement since those payments were not intended to be and in fact were not advance payments of compensation. *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000).

The Board held that, under Section 14(j), employer is entitled to a credit for advance payments of compensation made by other potentially liable employers in settlement of claimant's occupational disease claim. Under *Cardillo*, the last covered employer to expose claimant to potentially harmful stimuli prior to claimant's awareness of his injury is liable for claimant's entire disability. Where an employer is found to be the responsible employer, it is wholly liable for claimant's disability; liability is not apportioned among successive employers. Thus, where an employer makes voluntarily payments but a later employer is ultimately found responsible, it cannot be seriously asserted that claimant is entitled to both the voluntary payments and a full overlapping recovery from the responsible employer. With appropriate credits or reimbursement, claimant recovers once for the full extent of his disability from the sole responsible employer. *Alexander v. Triple A Machine Shop,* 32 BRBS 40 (1998), *rev'd sub nom. Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

Citing the law of the case doctrine, the Board reaffirmed its previous decision in *Alexander,* 32 BRBS 40 (1998), that employer is entitled to a credit for settlement payments claimant received from other longshore employers for the same disability. *Alexander v. Triple A Machine Shop,* 34 BRBS 34 (2000), *rev'd sub nom. Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

The Ninth Circuit reverses the Board's holding that the last responsible employer is entitled to a credit for Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim. The court held that, contrary to the Board's holding in 32 BRBS 40, the plain language of Section 14(j) authorizes a credit only when the same employer who has made advance payments of

compensation seeks the credit against later payments. Moreover, the court holds that a settlement is not an "advance payment." *Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002), *rev'g in pert. part Alexander v. Triple A Machine Shop,* 32 BRBS 40 (1999) and 34 BRBS 34 (2000).



Citing *Alexander,* 32 BRBS 40 (1998), the Board affirmed the administrative law judge's finding that employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The Board distinguished *Aples,* 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989), in which the employer was denied a credit for the previous employer's settlement payment, on the basis that *Aples* involved multiple traumatic injuries with successive employers as opposed to the instant case in which employer was held solely liable for the entire disability caused by decedent's occupational disease. *Ibos v. New Orleans Stevedores,* 35 BRBS 50 (2001), *rev'd in pert. part and aff'd on other grounds,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied,* 124 S.Ct. 1038 (2004).

The Fifth Circuit reverses the Board's holding that the employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The court defers to the Director's position that the amounts received from the settling employers are irrelevant to the amount owed by the responsible employer and should not reduce its liability, rejecting the Board's application of the *Nash* extra-statutory credit doctrine to a case involving alternative liability for a single occupational injury. *New Orleans Stevedores v. Ibos,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003) (Jones, J., dissenting on the basis that there is no reason not to apply the *Nash* credit doctrine, applicable in "aggravation rule" cases, to cases involving a single occupational injury), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied,* 124 S.Ct. 1038 (2004).

The Board affirmed its holding that benefits may not be retroactively terminated pursuant to Section 22 when no benefits are due, as this would contravene the plain language of the statute and the rules of statutory construction. The Board further affirms its holding that there was no overpayment against which employer is entitled to a credit. Claimant's temporary total disability award for injuries to his back, head, leg, and for a psychological impairment was completely terminated; it was not reduced to a partial award. The fact that claimant became entitled to a permanent partial disability award for a hearing loss arising out of the same accident upon the termination of the total disability award does not entitle employer to a credit either pursuant to Section 22 as the total award cannot be retroactively terminated or pursuant to Section 14(j) as there were no advance payments of compensation made. *Spitalieri v. Universal Maritime Services*, 33 BRBS 164 (1999) (*en banc*) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 33 BRBS 6 (1999), *rev'd,* 226 F.3d 167, 34 BRBS 85(CRT)(2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

The Second Circuit holds that benefits may be retroactively terminated pursuant to Section 22, at any point after the date of injury. Specifically, on modification, the administrative law judge, as further modified by the Board, terminated on February 21, 1996, claimant's temporary total disability award from injuries to his back, head, leg, and a psychological impairment. The employer had paid compensation for temporary total disability through January 20, 1998, amounting to an overpayment of approximately $54,000. The court reversed the Board's holding that employer is not entitled to credit this overpayment against its liability for a scheduled hearing loss award arising from the same accident. Contrary to the Board's holding, the court reasoned that a termination of benefits is a "decrease" in benefits as that term is used in Section 22, and thus is permitted to "affect compensation previously paid" in the form of a credit for benefits due for a different disability. *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *rev'g* 33 BRBS 6 and 33 BRBS 164 (1999) (on recon. *en banc*) (Brown and McGranery, JJ., dissenting), *cert. denied*, 532 U.S. 1007 (2001).

Where claimant-widow received increased compensation payments on behalf of her son for the period her son attended a non-accredited high school after he reached the age of eighteen, the Board ruled that any overpayments employer made to claimant on behalf of her son be credited against its future compensation liability to claimant, pursuant to Section 14(j). Contrary to claimant's contention, the Board held that Section 9(b) provides for the payment of one death benefit where a decedent is survived by a spouse, including additional compensation for surviving children, and thus, this case does not contain two separate death claims. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

In denying claimants' motion for reconsideration, the Board elaborated on its statement, made in a footnote, that employer may be entitled to a credit for the overpayment it made to Brad Valdez against the additional compensation owed to Josh Valdez. On reconsideration, the Board distinguished its decision in *Gilliland*, 34 BRBS 21 (2000), as that case involved application of the credit provision at Section 33(f). This case concerns the overpayment of death benefits which is governed by Section 14(j), *see Hawkins*, 33 BRBS 198 (1999). As the Act provides for one "death benefit" to be distributed to appropriate survivors, an overpayment to one survivor may be credited against liability to another survivor. *Valdez v. Crosby & Overton,* 34 BRBS 185, *aff'g on recon.* 34 BRBS 69 (2000).

The Board held that employer may not offset excess disability payments against its liability for death payments under Section 14(j), as under this section disability benefits cannot be viewed as an advance payment on the subsequent death claim. It has consistently been held that a worker's claim for disability benefits and a survivor's claim for death benefits involve two separate and distinct rights. The Board's holding finds support in case law interpreting Section 3(e) and Section 33(g), two of the Act's other credit provisions, as well as the other subsections of Section 14. The Board distinguishes *Hawkins,* 33 BRBS 198 (1999), where the Board affirmed the administrative law judge's decision to allow employer a credit for an overpayment of the death benefits for a decedent's child against its obligation to the widow, on the ground that the Act provides for only one death benefit; the instant case involves two separate claims: an *inter vivos* disability claim, and a death benefits claim. Moreover, Section 14(j) does not provide an offset based on equitable principles. *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.,* 35 BRBS 112 (2001), *aff'd,* 293 F.3d 741, 36 BRBS 18(CRT)(5th Cir. 2002).

The Fifth Circuit affirmed the Board's holding that employer may not offset excess disability payments against its liability to the widow for death payments under Section 14(j). The court holds that the plain language of the statute refers to reimbursement for "advance" payments of compensation, and here, as employer paid pursuant to an administrative law judge's order, employer's payment cannot be deemed to be "advance payments of compensation" under Section 14. The court also agreed with the Board that an *inter vivos* disability claim and a death claim are two separate claims, and payments on one cannot be offset against the other. The court further rejects employer's request for offset based on equitable principles. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002), *aff'g* 35 BRBS 112 (2001).

Section 14(j) permits an employer who has paid advance payments of compensation to be reimbursed out of unpaid installments of compensation. As the record herein contains evidence that employer paid claimant a post-injury salary, which may or may not have been advance payments of compensation, the Board remanded the case to the administrative law judge for further consideration of this issue. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

The Board rejects claimant's assertion that the administrative law judge erred by not including money paid by employer to claimant as part of an aborted settlement agreement as compensation forfeited by claimant under Section 8(j). Specifically, the Board holds that the administrative law judge properly determined that once the approval of the settlement was vacated, claimant's entitlement to that money, as disability compensation, was subject to adjudication and is properly viewed as an advance payment of compensation within the meaning of Section 14(j) of the Act and not, as claimant argued, compensation already paid pursuant to Section 702.286(c).

*Floyd v. Penn Terminals, Inc.,* 37 BRBS 141 (2003).

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Section 14(m)

The Board held that the administrative law judge erred in applying Section 14(m), which was repealed in 1972, to either claimant's 1970 siderosis claim or his 1982 asbestosis claim. Following Morgan, 14 BRBS 784 (1982), the Board held that, since the $24,000 ceiling was not reached prior to the effective date of the 1972 Amendments for either claimant's siderosis or asbestosis claim, Section 14(m) does not apply in either instance and would not bar claimant's right to further compensation. O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988), aff'd and modified on recon., 22 BRBS 430 (1989).

The Board rejects employer's argument that claimant's recovery for permanent total disability should be limited to the Section 14(m) statutory maximum in effect at the time of claimant's 1941 injury, concluding that the administrative law judge properly determined based on Hastings v. Earth Satellite Corp., 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), cert. denied, 449 U.S. 905 (1980), and Bradley v. Richmond School Board, 416 U.S. 696 (1974), that the 1972 repeal of this provision should be accorded retroactive effect. The Board also agreed with the administrative law judge's determination that Argonaut Ins. Co. v. Director, OWCP, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981), supports retroactive application of the repeal of Section 14(m), noting that in Argonaut, the First Circuit, in which this case arose, specifically rejected employer's argument that the repeal should not be applied retroactively because it would be unfair to impose upon carriers obligations they had not anticipated and would not be able to recoup. Simpson v. Bath Iron Works Corp., 22 BRBS 25 (1989).